United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

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United States Court of Appeals For the Second Circuit

JORGE ANTONIO MELARA-ESQUIVEL,
Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

This Petition for Review was filed pursuant to Section 106(a) of the Immigration & Nationality Act, 8 USC 1105a, for judicial review of the Final Order of the Board of Immigration Appeals entered on March 26, 1976, affirming the previous ruling of the Immigration Judge finding respondent deportable, and ordering him deported from the United States.

ISSUES PRESENTED

1. Whether the detention and interrogation of Petitioner by Immigration Officers on a public street, in the absence of showing reasonable suspicion of alienage, contravened the standard laid down by the Supreme Court in *United States v. Brigonini-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975).

2. Whether petitioner's totally uncontraverted prehearing Affidavit and Hearing Testimony concerning the manner in which he was arrested on a public street shifted

the burden to the Government to demonstrate the lawfulness of its conduct.

3. Whether the Immigration Judge erred in refusing to hold a hearing on Petitioner's Motion to suppress evidence, separate and apart from the Deportation Hearing.

4. Whether evidence culled from the Services' alien data bank *only* as a result of information furnished by petitioner and used to establish petitioner's deportability, should have been suppressed as the "fruit of the poison tree".

5. Whether the Immigration Judge and Board of Immigration Appeals wrongfully denied to petitioner the privilege of voluntary departure and ordered him deported as a penalty for the assertion of constitutional rights.

STATEMENT OF FACTS

Petitioner, Jorge Antonio Melara-Esquivel, was charged in an Order to Show Cause issued by the Immigration & Naturalization Service (INS) with being a native and citizen of El Salvador, who entered the United States at San Ysidro, California without having been inspected (A-1). At his deportation hearing, petitioner steadfastly refused to concede the allegations in the Order to Show Cause, and declined to submit to questioning concerning alienage and deportability. Instead he invoked his right to remain silent under the Fifth Amendment to the Constitution (A-11, 12, 13).

In a written motion filed prior to hearing, petitioner requested a separate hearing before the Immigration Judge in order to determine whether certain evidence concerning him should be suppressed as the fruit of unlawful conduct on the part of the Immigration Service. This motion was supported by the sworn affidavit of petitioner, and

requested that the arresting officers be made available at hearing.

Petitioner's pre-hearing affidavit and hearing testimony concerning the manner of his arrest and interrogation were never contradicted in any way, and the Government declined to make the arresting officers available at the hearing. This uncontroverted testimonial and documentary evidence establishes that on the morning of April 7, 1975, Esquivel was walking on a public street in Great Neck, Long Island, New York, on his way to a luncheonette, when he noticed a stranger watching him and apparently waiting for him on the street. The stranger, who subsequently turned out to be an Immigration Officer, followed Esquivel into the luncheonette and then out again where he accosted him and began a street interrogation concerning Petitioner's immigration status. The questioning led to petitioner's immediate arrest, and interrogation at Immigration headquarters. (A-4, 5, 17, 18). Despite the pre-filing of respondent's Motion to Suppress, and supporting affidavit, the Immigration Judge refused to issue a protective order when requested to do so, declaring that testimony elicited in connection with petitioner's suppression motion could not be used to establish alienage and deportability. (A-17). As a result, the Government Trial Attorney, while cross-examining petitioner concerning his pre-hearing affidavit, attempted to have him admit birth outside of the United States, notwithstanding petitioner's previous assertion of the Fifth Amendment on this point (A17-18). In this connection, in order to assert his rights under the Fourth Amendment, and explain the circumstances surrounding his arrest, petitioner was compelled to admit that he was "from El Salvador" and had entered the United States through Mexico. He did not, however, admit that he was an alien (A-18).

In view of the petitioner's refusal to concede the allegations in the Order to Show Cause, and, in the absence of sufficient facts to establish alienage and deportability, the Trial Attorney offered various documents from the files of the Immigration Service relating to one Jorge Antonio Melara, a citizen of El Salvador, who had entered the United States in 1971, and who had been granted voluntary departure by an Immigration Judge. Petitioner asserted his Fifth Amendment right to remain silent and declined to answer when asked whether or not these documents related to him. These documents were admitted into evidence by the Immigration Judge over objection, notwithstanding the fact that (a) they were not connected with respondent other than by a partial similarity in name, (b) they were asserted by petitioner to be the fruit of an unlawful interrogation, and no separate hearing had been granted upon this assertion (A11-12).

Following receipt of the Government's evidence, and an indication by the Immigration Judge that he regarded it as sufficient to establish deportability, the petitioner applied for the privilege of voluntary departure in lieu of deportation, pursuant to the provisions of Section 244 of the Immigration & Nationality Act (8 U.S.C. 1254). In testifying in support of this application, petitioner specifically invoked the provisions of 8 CFR 242.17, which provides that an application for voluntary departure "shall not be held to constitute a concession of alienage or deportability in any case in which respondent does not admit his alienage and deportability". (A-21).

In support of his request for voluntary departure, petitioner testified that he had never been arrested by the police anywhere in the world, that he possessed the funds to purchase his own ticket, and that he would be willing to leave the United States in the time set for such departure (A-22).

Petitioner also testified that his entire immediate family, consisting of his mother and three younger brothers are permanent residents of the United States. All had been granted immigrant visas based upon his mother's approved labor certification. Petitioner would also have been permitted to immigrate to the United States as the unmarried minor child of the primary visa applicant (his mother), but for the fact that the visa appointment notice was sent to the Esquivel family by the Consulate in El Salvador on the eve of petitioner's twenty-first birthday, thus making it impossible for him to qualify as a minor child at the visa interview itself (A22-24). The net effect of the Consul's delay in scheduling the appointment was that petitioner's entire immediate family left for the United States leaving him behind in El Salvador. Out of desperation, petitioner arranged to have himself transported unlawfully into the United States in order to be reunited with his mother and brothers (A24-26).

In denying voluntary departure, the Immigration Judge ignored completely the compelling equities surrounding petitioner's case, and ordered him deported. In this determination, the Immigration Judge stated that the documents received in evidence, together with the statutory presumption contained in Section 291 of the Act, established petitioner's alienage and deportability; that Section 287 of the Immigration and Nationality Act justified the street interrogation of petitioner; that prior to the hearing, petitioner was offered an opportunity to leave the United States voluntarily, which he did not accept; and that it would be improper to permit petitioner to prolong his stay in the United States by assertion of "legal claims of little validity". (A-38).

In affirming the determination of the Immigration Judge, the Board of Immigration Appeals held that it was

not necessary to determine the lawfulness of the street detention and interrogation of petitioner because deportability had been established through the Service files, and not by evidence seized at the time of petitioner's arrest." (A-43). The Board thus circumvented the entire issue. The Board also agreed with the Immigration Judge that voluntary departure should be denied, and ordered petitioner deported.

ARGUMENT

I

THE DETENTION AND INTERROGATION OF PETITIONER ON A PUBLIC STREET CONSTITUTED A VIOLATION OF THE FOURTH AMENDMENT.

In *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975), the Supreme Court firmly established that the Fourth Amendment forbids the stopping of persons for questioning about their citizenship or right to be in the United States unless there is a reasonable suspicion that they might be aliens. In its decision, the Supreme Court made the following pertinent statement and observations, which are unquestionably the law of the land with regard to the claimed right of the Immigration and Naturalization Service to detain and interrogate individuals at random in connection with enforcement of the immigration laws:[1]

1. Although certain modifications were made by the Court in the recent decision of *United States v. Martinez-Fuerte* (No. 74-1560) and *Sifuentes v. United States*, (75-5387), announced July 6, 1975, these modifications only apply to *fixed vehicle checkpoints*.

"The Fourth Amendment applies to all seizures of the person including seizures that involve only a brief detention short of traditional arrest. (95 S.Ct. 2578)"

* * *

"For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

The effect of our decision is to limit exercise of the authority granted by both Sec. 287(a)(1) and Sec. 287(a)(3). Except at the border and its functional equivalents, officers and a roving-patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." (95 S.Ct. 2581-2583, emphasis added)

In the present case, the totally unrebutted and uncontroverted testimony of petitioner was that he was walking on a public street, engaged in no suspicious activity, when he was followed, accosted, interrogated, and arrested by an officer of the United States Immigration and Natrualization Service. Although the government was given advance notice of the fact that the petitioner would challenge the validity of his arrest and interrogation at the deportation hearing, it chose voluntarily to proceed without introducing any testimony concerning the manner of petitioner's arrest and interrogation, and without making the arresting officers available to give testimony at hearing, and be subjected to cross examination.

Since the government chose to leave petitioner's testimony totally unrebutted, the constitutional standards laid down by the Court must be applied to what is essen-

tially an agreed state of facts. In this regard, there can be no doubt that the street detention and interrogation of petitioner constituted a flagrant abuse of the Fourth Amendment. In *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882 (N.D. Ill. 1975) the Court, noted:

> "While private vehicular transportation has become an essential part of our freedom to travel domestically, it would be anomalous to guarantee the automobile driver greater freedom of movement than that afforded the pedestrian. Indeed, to the extent that different Fourth Amendment standards have developed among persons, places and vehicles, the less stringent have been applied to vehicles because of the exigent circumstances inherent in their operation . . . therefore, if, as *Brignoni-Ponce* holds, a vehicle cannot be stopped unless the agent reasonably suspects that it contains aliens illegally in the country, a person should not be stopped unless the agent reasonably suspects that he or she is an alien illegally in the country. (398 F.Supp. 898, footnote omitted.)

See, also, *Cheung Tin Wong v. United States Immigration and Naturalization Service*, 468 F.2d 1123 (DC Cir. 1972); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973); *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975). See, generally, Fragomen, "Searching for Illegal Aliens: the Immigration Service Encounters the Fourth Amendment," 13 San Diego L.Rev. 82 (1975).

What emerges from the case law is the uncontrovertible proposition that the Immigration Service does not have the authority to stop individuals at random (except at the border or its functional equivalent) in order to determine whether or not they are aliens. While individuals may be stopped on less than probable cause, the involved officer must be acting upon "specific articulable facts, together

with rational inferences from those facts", which lead him to reasonably suppose that the individual he is about to detain and interrogate may be an alien illegally in the United States. In this regard, the case presently before the Court is clearly distinguishable from the cases decided by this Circuit in which claims of illegal arrest and interrogation were rejected by the Court. In both *Ojeda-Vinalas v. INS*, 523 F.2d 286 (2d Cir. 1975), and *Avila-Gallegos v. INS*, 525 F.2d 666 (2d Cir. 1975), the Court recited and made part of its opinion the specific articulable facts upon which the investigating officers of the Immigration Service were acting at the time of the initial contact with the involved aliens. In the present situation, there are no facts to which the government can point which in any way demonstrate a reasonable suspicion on the part of the arresting officer that Mr. Esquivel was an alien. What *is* apparent, is that a pedestrian going about his own business was followed, cornered, and badgered into revealing enough facts about himself to justify an arrest.

This arrest led to the deportation hearing for which judicial review is now being sought. In seeking relief from what is clearly unlawful conduct on the part of the Immigration Service, no words are more compelling than those written by this Circuit in *United States v. Barbera, supra*:

> "The problem of immigration is one of national concern. The adverse economic impact caused by illegal aliens is substantial and well-documented. But to respond to the problem by watering down the probable cause requirements of the Fourth Amendment is most surely to take the lowest constitutional road. (514 F.2d at 301-302)."

On the basis of the above, we respectfully assert that there can be no question that the government's case against Mr. Esquivel was set in motion by an act that was flagrantly illegal.

II

ALL OF THE EVIDENCE USED BY THE IMMIGRATION SERVICE TO ESTABLISH PETITIONER'S ALIENAGE AND DEPORTABILITY CONSTITUTED THE FRUIT OF THE UNLAWFUL CONDUCT OF I.N.S. OFFICERS, AND SHOULD HAVE BEEN SUPPRESSED.

At the outset, we wish to note that we are not contending that an unlawful arrest or interrogation renders all subsequent deportation proceedings void. Nor are we contending that the *body* of an alien illegally apprehended must be suppressed so that he must necessarily be set loose to remain at liberty forever in the United States. What we are asserting is that all *evidence which is the fruit of the government's unlawful act must be suppressed:* that it may not be lawfully used in order to establish a person's alienage and deportability from the United States.

At this juncture, there can be no dispute that illegally obtained evidence in a deportation proceeding must be suppressed in the same way that illegal evidence is suppressed in a criminal proceeding. In *Illinois Migrant Council v. Pilliod, supra,* the Court specifically noted:

> "Were this a criminal case or a deportation proceeding, (as all of the reported cases in this area have been), the decisional process would be completed. Any evidence—tangible or testimonial (But see, *Brignoni-Ponce, supra,* at —, N. 2, 95 S.Ct. at 2577) — derived from the obviously unlawful stops . . . would be ordered suppressed. But this is not a criminal case or deportation proceeding in which retrospective examination is made of alleged official misconduct and in which

> the imperfect and frustrating but none the less limited remedy of suppression is invoked." (398 F.Supp. at 898)

In fact, the Board of Immigration Appeals itself has recognized that illegally obtained evidence must be suppressed in a deportation proceeding, and has even articulated a procedure to be filed in ruling upon the admissability of unconstitutionally obtained evidence. *In Matter of Tang*, Int. Dec. 2080, 13 INS 691 (1971), the Board explained its procedure as follows:

> "One who raises the claim must come forward with proof establishing a prima facie case before the Service will be called upon to assume the burden of justifying the manner in which it obtained its evidence . . . The reason for our rule — one similar to that which prevails in criminal massters — is well stated in *Garcia*, supra. (United States v. Garcia, 272 F.Supp. 286 (S.D.N.Y. 1967)."

In *Matter of Tsang*, Int. Dec. 2187 (1973), the Board cited *Matter of Tang, supra*, for the proposition that "the rule (concerning motions to suppress) which has been adopted in criminal cases has been adopted for use in deportation hearings.

In the present situation, although the petitioner made out a clear prima facie case of unlawful interrogation and arrest prior to the commencement of the deportation hearing, the Immigration Judge, and later the Board of Immigration Appeals sought to circumvent the need to grant petitioner a separate suppression hearing, and the need to even rule upon the validity of the constitutional claims being presented.

Initially the Immigration Judge denied petitioner the right to a separate suppression hearing by indicating that his motion was "premature" because no evidence had been offered by the government at the time the motion was

originally made (A-3, 4). Similarly, when evidence *was* offered by the government during the course of the hearing, and the request for a separate suppression hearing was made by counsel, it was also denied (A-16, 17).

We respectfully submit that the repeated refusal of the Immigration Judge to grant petitioner a separate hearing in which to prove his claim that evidence was unlawfully obtained, was itself a flagrant denial of fundamental constitutional rights. In short, the Immigration Judge, by denying petitioner's request for a separate suppression hearing, placed him in the position of having to decide whether to forego his Fifth Amendment right to remain silent at the hearing, or to waive that right in order to attempt to vindicate the Fourth Amendment rights, which he maintained the government had previously violated.

The history of American jurisprudence is replete with court holdings indicating that actions which place unreasonable burdens upon the assertion of constitutional rights are themselves unlawful. See, *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209 (1968); *Jackson v. Denno*, 378 U.S. 137, 84 S.Ct. 1774 (1965); *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968). As the Supreme Court stated in *Simmons v. United States, supra:*

> "Thus, in this case, Garrett was obliged to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim, or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. *In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.*" (emphasis added)

If the government's position in this regard is correct, a respondent in deportation proceedings would *never* be able

to assert that evidence sought to be used against him was illegally obtained, because in so proving, he would be compelled to provide independent testimony related to alienage on which a deportation order could be predicated without reference to the evidence sought to be suppressed. We respectfully submit that the only procedure which is constitutionally permissable in the context of deportation proceedings is one which provides the respondent with a totally *separate* hearing during which he may challenge the validity of evidence which the government is seeking to introduce against him. The *separate* nature of this proceeding would prevent the government's use of statements and admissions made by the respondent in the course of the suppression hearing to establish alienage and deportability.

In the present case, although the respondent *did* testify in support of his suppression motion, no evidence was elicited from him during the trial attorney's cross examination which conclusively established his alienage or deportability. Notwithstanding this fact, the petitioner was aggrieved by the Immigration Judge's failure to hold a separate hearing because his ability to *freely testify* about all of the details of his interrogation by Service officers was severely impaired by the fear of providing "independent" evidence upon which the Immigration Judge could predicate a finding of his deportability.

Having deprived the petitioner of a separate suppression hearing, the Immigration Judge and the Board of Immigration Appeals sought to further circumvent his constitutional rights by relying on the fact that all of the evidence which the trial attorney introduced to establish deportability was "independent" because it came from Immigration Service files and was not taken from respondent. Initially we note that in the absence of a full

evidentiary hearing at which the entire suppression question could have been evaluated, it is legally impossible to determine whether or not the evidence introduced by the trial attorney was taken from immigration files, or from the petitioner. If petitioner had been given the opportunity to freely testify (without running the risk of establishing his own deportability) and if the Immigration Service had made the arresting officers available at hearing, or otherwise conclusively demonstrated the manner in which the documents introduced were obtained, it would *then* be possible to conclude whether or not they constituted independent idence. We respectfully submit that the offhand statements and implications of the trial attorney to the effect that the various documents introduced were taken from government files are no substitute for a separate suppression hearing and proper explanation by the government of the manner in which it obtained its evidence. Because the Immigration Judge denied petitioner a separate suppression hearing and because the trial attorney declined both to make the arresting officers available at hearing and to fully explain the manner in which the documents were obtained, it should be *presumed* that all of the evidence introduced to establish alienage and deportability came as a direct result of the unlawful street detention and interrogation of petitioner.

We also submit that, even assuming the file of one Jorge Antonio Melara was obtained from the Government's files and not from the respondent directly, all such evidence must be considered the "fruit of the poisoned tree". The doctrine of the "fruit of the poisoned tree" is well established in American law. It was first recognized by the Supreme Court in the case of *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341 (1913). In the case of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182

(1920), the Court allowed the suppression of the *knowledge* gained by law enforcement officers from their previous illegal search and copying of defendant's documents. In that decision the Court stated:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely the evidence so applied shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the fact thus obtained becomes sacred and inaccessible; if knowledge then is gained from an independent source, there may be proof like others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed." (251 U.S. at 392).

In the present case, if we assume that the evidence obtained about petitioner came from the files of the Immigration Service, it is clear that the *only* way that the Government could have had access to that information (buried away in its archives together with millions of other files), would have been through the leads provided to Service officers by the statements unlawfully obtained from the petitioner. While it would, of course, have been helpful to have an immigration officer testify concerning the information provided by Esquivel and the way it was used to search the Government files, the Government's recalcitrance made this impossible.

Reproduced in the Appendix herein, is a declassified report made by the Office of Security of the Central Intelligence Agency under a Brookings Institution Grant. This report summarizes in detail particular sources of information for Federal Investigators, including the files maintained by the Immigration & Naturalization Service (A. 48-56). The report indicates that the "Master Index" maintained by the I&NS contains 40,000,000 documents;

and that the accession rate is 3,000,000 a year. It is quite probable that the information obtained from records, apparently pertaining to the petitioner, was culled from this Master Index. The report also notes:

> "Investigators desiring to check the record of arrival and/or departure of a nonimmigrant must furnish *as much information as possible*, particularly his or her full name, citizenship and date of birth. (A. 229). (Emphasis added)

Clearly, the sort of information necessary to have enabled the I&NS to have separated the petitioner's records from the millions of other records with which it was buried came from the unlawful interrogation of petitioner. We respectfully submit that the mere *possession* of a file relating to Mr. Esquivel by the Government, did not amount to *availability* until the Government had engaged in flagrantly unconstitutional conduct. It is also clear that the Government had absolutely no *interest* in even attempting to locate petitioner's file until its unconstitutional street dragnet had yielded what is known in Immigration Service parlance as a "wet alien".

In *Au Yi Lau v. INS.* and *Tit Tit Wong v. INS.* 445 F. 2d 217 (D.C. Cir. 1971) aliens who were respondents in a deportation proceeding protested that their arrest was illegal. The Court found that the arrest in question was legitimate in fact, but felt it necessary to respond to the secondary argument put forth by the Government which was that even if the arrests were illegal, deportation was in order because documentary evidence which the Government offered in the form of Seamen's Landing Permits, was *independently* obtained. The Court stated in a footnote that it was "unable" to conclude that the Government's claims were "well taken". In this connection the Court noted:

"We think it not unlikely that their [files] availability may have been dependent upon determining what date and in what place petitioners entered the country." (445 F. 2d at 224.)

Similarly in *Matter of Perez-Lopez*, Int. Dec. 2132 (1972) the Immigration Judge terminated deportation proceedings on the ground that evidence was illegally obtained from an alien's living quarters and "used as leads to obtain evidence from Service and State Department files." The Board permitted the case to be reopened only upon presentation of independent evidence, consisting of an anonymous letter.

On the basis of the above, we respectfully submit that the evidence that the Service introduced in order to establish deportability (petitioner's previous immigration record) was in no way independent of petitioner's unlawful street detention and interrogation, but resulted directly therefrom. In short, through its unlawful conduct, the Government came into possession of information which it never should have had, and on the basis of that information, was able to locate a pre-existing file which a) it was never previously interested in, and b) it never would have been able to locate in the absence of the leads and information wrongfully obtained.

We also respectfully submit that the question of the admissibility of this evidence should be approached from a larger public policy point of view. There can be no question that the purpose of the suppression rule, in both criminal and deportation proceedings, is to act as a deterrent — to prevent Service Officers from violating the law by putting them on advance notice that no evidence wrongfully obtained may be utilized to secure a conviction or deportation. If the I&NS is permitted to utilize its pre-existing

files (of which there are millions) in order to secure a deportation, there can be no deterrent effect stemming from the suppression rule, and Service Officers would be free to violate with impunity the constitutional rights of aliens, and of the public-at-large. In view of the undeniable fact that there are pre-existing records of one kind or another in possession of the I&NS with regard to the vast majority of aliens in this country, both legal and illegal, Service Officers would always be able to rely on "independent evidence" in order to establish deportability. Needless to say, such a result would make the Fourth Amendment meaningless in the context of the I&NS' search for illegal aliens, and we respectfully submit that such result would be unconscionable.

On the basis of the above, we respectfully submit that all of the evidence which the Government introduced to establish the petitioner's deportability should have been suppressed. We also wish to note that this case is clearly distinguishable from the holding of this Circuit in *Avila v. Gallegos, supra,* in which the Court held that the deportation hearing testimony of petitioner, standing alone, was sufficient to support the order of deportation, and required dismissal of the aliens' petition. In the present situation the only testimony in which the petitioner did, in fact, admit his alienage was that offered in connection with his application for voluntary departure. The Board of Immigration Appeals has made it crystal clear that no testimony which is introduced solely in support of an application for voluntary departure, under 8 C.F.R. 242.17(d) may be used to establish deportability. In *Matter of Bulos,* Int. Dec ____ (A20 798 198) the Board stated:

> "The testimony of a respondent in connection with his application for the privilege of voluntary departure may or may not touch upon alienage and

> deportability. In any case, such testimony must not be used for the purpose of either establishing or confirming its alienage or deportability.

Hence, because the petitioner steadfastly adhered to the Fifth Amendment privilege of remaining silent when examined by the Trial Attorney concerning his alienage and deportability, and because the petitioner, in his testimony related to the suppression motion, managed to avoid the issue of alienage, the *only* evidence of record which may be used to justify the order of deportation is the evidence which is tainted as the fruit of an unlawful arrest and interrogation, and which should have been suppressed.

On the basis of all of the above, it is respectfully submitted that the Board of Immigration Appeals erred in not reversing the decision of the Immigration Judge; that all of the evidence which was introduced by the Government to establish petitioner's alienage was tainted and should have been suppressed; and that the deportation order should, therefore, have been vacated as totally unsupported by any legitimate evidence.

III.

DENIAL OF THE PRIVILEGE OF VOLUNTARY DEPARTURE TO PETITIONER RESULTED FROM THE UNLAWFUL IMPOSITION OF A PENALTY FOR THE ASSERTION OF CONSTITUTIONAL RIGHTS

Pursuant to Section 244(e) of the Immigration & Nationality Act (8 U.S.C. 1254(e)) any alien under deportation proceedings, who is of good moral character, may be permitted to leave voluntarily at his own expense in lieu of deportation. The advantage gained by avoiding

deportation is clear: permission to reapply following deportation, an often unattainable requirement of Section 212(a)(17) of the Act, (8 U.S.C. 1182 (a)(17) is not required when and if the alien obtains a legitimate future basis to immigrate to the United States. In actual practice, the vast majority of those aliens placed under deportation proceedings are permitted to leave voluntarily without being deported, and it is respectfully requested that judicial notice be taken by the Court of this fact.

Although the granting of the privilege of voluntary departure is discretionary with the Immigration Service, it is clear that such power must be wielded in a rational non-arbitrary manner. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507 (1967); *Dismuke v. United States*, 297 U.S. 167, 56 S.Ct. 400 (1936); *Del Mundo v. Rosenberg*, 341 F. Supp. 345 (C. D. Cal. 1972); *Lam Tat Sin v. Esperdy*, 227 F. Supp. 482 (SDNY), aff'd. 334 F. 2d 399 *cert. den.* 379 U.S. 901 (1964).

In the present case, the record leaves no doubt that voluntary departure was denied as a penalty for the assertion of constitutional rights. Prior to hearing, the Service offered to consent to a period of four months voluntary departure, assuming, of course, that petitioner would concede his deportability to the Judge and abandon his constitutional defenses. Such offer was declined by petitioner; however, the Government Trial Attorney saw fit to place the offer and refusal on the record in order to persuade the Immigration Judge that petitioner should be deported (A-28). This tactic was apparently successful as demonstrated by the following statement made by the Immigration Judge in his opinion (A37-38):

> "Prior to the opening of this proceeding, he (respondent) was offered a generous opportunity to depart from the United States within a period of 4

> months, and he rejected that opportunity. *** He chose to refuse the generous opportunity offered him by the enforcement arm of the United States Immigration Service to leave voluntarily."

The hearing transcript also clearly demonstrates that denial of voluntary departure came as a direct punitive result of petitioner's continued assertion of constitutional rights. In this regard, the following colloquy between the Immigration Judge and counsel is highly informative (A31-32).

> "Immigration Judge: I am not asking you to waive your right to appeal. I just want to know if you want to pursue all of these legal rights or if you will not pursue them and rest on your application. In my mind counsel there is the question of the request for voluntary departure without you giving up any of your legal rights of appeal if I am in error or any question, or if I am not granting what is required under the law and regulations, that is one matter. But if there is a sincere request to depart because the respondent knows that he is illegally here and acknowledges that and would like to leave voluntarily to preserve his rights to return that's another matter.
>
> Mr. Rothstein: I think that there is such a sincere request, but I don't want to mislead the Court by giving the implication that we will not be appealing if voluntary departure is granted because there is a possibility that we will.
>
> Immigration Judge: All right, that's all I wanted to know."

In his written opinion, the Immigration Judge further elaborated on this point by mentioning as a reason for denial of voluntary departure his finding that:

> "It is clear that he does not intend to leave within any time that I would grant him, but intends to

> pursue his alleged legal rights . . . and I cannot permit him to prolong his illegal stay in the United States by continuous legal claims of little validity. (A37-38).

It is clear that, if the rationale employed by the Immigration Judge is valid, the only way in which a respondent in deportation proceedings could ever convince the Judge that his request was to depart was "genuine", would be not to assert *any* legal defenses to deportation at the hearing, and to promise not to appeal any legal claims to the Board or the Courts. Such rationale clearly imposes an impermissible burden upon the exercise of constitutional rights, and serves as a tacit warning to all respondents under deportation proceedings that the assertion of legal claims regarded by the Judge as being of "little validity" will be likely to result in the entry of an order of deportation. We submit that such rationale should be summarily struck down by the Court. Cf. *Simmons v. United States, supra.*

It is also important to note that the improper ruling of the Immigration Judge with regard to voluntary departure was not cured by the decision of the Board of Immigration Appeals which articulated other reasons for denial of voluntary departure. Clearly, if the Immigration Judge had granted voluntary departure, the Board would have been compelled, pursuant to its uniform practice, to grant voluntary departure, to avoid placing a respondent in a *worse* position than he would have been if he had not appealed. Stated another way, the refusal of the Immigration Judge to grant voluntary departure relieved the Board of the need to grant voluntary departure, and thereby placed a continuing penalty upon petitioner for assertion of legal rights.

It is also respectfully asserted that the denial of voluntary departure by the Board was arbitrary, *per se*. Such denial was predicated entirely upon respondent's illegal entry from Mexico, to the exclusion of any consideration of the very special equities present in this case. As the Court stated in *United States ex rel. Giacalone v. Miller*, 86 F. Supp. 655 (S.D.N.Y., 1949)

> "the illegal entry itself does not mar his record. Many deportation cases arise from the fact of illegal entry, and it would render the provisions for discretionary relief or demonstration of good moral character meaningless in a sizable portion of deportation cases if illegal entry were considered sufficient alone to impugn good moral character." (86 F. Supp. at 657, Footnote 1).

Clearly the Board and the Immigration Judge declined to give any weight at all to the plight of petitioner, a young man just turned twenty-one, denied the right to immigrate with his family solely because the Consul scheduled the visa appointment the day *after*, rather than the day before his twenty-first birthday. While his subsequent entry to rejoin his family was certainly unlawful, can we, from a human and moral point of view, conclude that such entry constitutes evidence of bad moral character, so as to justify denial of discretionary relief?

Had Mr. Esquivel been born in the Eastern Hemisphere, rather than the Western Hemisphere, as the unmarried son of a permanent resident, he would have been eligible for an immigrant visa in the "Second Preference". See, 8 U.S.C. 1153(a)(2), Section 203(a)(2), Immigration and Nationality Act. The absence of a similar preference system for the Western Hemisphere is universally considered unfair, and anomalous, and consequently several bills are currently pending before both houses of Congress which would revise the entire immigration structure. Although there are many

differences between the various bills, they virtually all propose to place the Eastern and Western Hemispheres on an equal footing, and to create a preference system for the Western Hemisphere. (See S 3074 introduced by Sen. James O. Eastland, March 4, 1976; S. 561 and 2405, introduced by Senator Kennedy, and H.R. 10323 sponsored by the Ford administration", Congressional Record, P. 2800, March 4, 1976). Under such proposed legislation, Petitioner would be eligible for an immigrant visa.

While we certainly do not condone Mr. Esquivel's improper entry, there should be no doubt that his desire to be reunited with his mother and brothers stemmed from one of the most basic and legitimate of human emotions. However, the decisions appealed from have penalized petitioner for his conduct in a way which may very well prevent him, as a deported alien, from *ever* lawfully rejoining his family in the United States.

We respectfully submit that the decisions of the Immigration Judge and Board of Immigration Appeals are unduly harsh and arbitrary and should be corrected judicially. The fact remains that if petitioner had chosen to accept the Government's initial offer, he would have been permitted to depart voluntarily (A. 28). However, because he chose to pursue his constitutional rights at the deportation hearing, the Government would have him deported and probably barred from ever reentering, no matter what legislative changes may occur. We therefore urge the Court, at the very least, to grant judicial relief from the order of deportation, and to order respondent to permit petitioner to leave the United States voluntarily at his own expense in lieu of deportation.

CONCLUSION

On the basis of all of the above, we submit that the Order of Deportation is invalid in that it is wholly predicated upon evidence which is the fruit of an unlawful search and seizure under the Fourth Amendment. We respectfully submit that the Order of Deportation be vacated by the Court, and proceedings be terminated, and, in the alternative, that the Order be vacated and that Petitioner be permitted to leave the United States voluntarily.

Respectfully submitted,

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By:
MARTIN L. ROTHSTEIN

DATED: New York, N.Y.
July 22nd, 1976

2284 FRIED, FRAOOMEN

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of July 197 6 deponent served the within Brief upon:

Allan A. Shader, Esq.

attorney(s) for

Respondent

in this action, at

Dept. of Justice, Federal Plaza, New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 26
day of July, 197 6

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977